

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**GRETCHEN H. HORNER**

Claimant

VS.

**U.S.D. 259**

Self-Insured Respondent

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Docket Nos. 1,033,054;  
1,033,055; 1,033,057 and  
1,033,058

**ORDER**

**STATEMENT OF THE CASE**

Respondent requested review of the September 14, 2009, preliminary hearing Order entered by Administrative Law Judge Thomas Klein. Lawrence M. Gurney, of Wichita, Kansas, appeared for claimant. Dallas L. Rakestraw, of Wichita, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) ordered respondent to pay the cost of claimant's cardiac work-up and the cost of replacing her preexisting pacemaker, as such was necessary before claimant could undergo neck surgery to treat her work-related injury.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 25, 2009, Preliminary Hearing and the exhibits and the transcript of the February 10, 2009, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

**ISSUES**

Respondent argues that it should not be required to subsidize claimant's treatment of a personal condition that preexisted her work-related injury. Accordingly, respondent requests the Board determine that it not be responsible for paying the costs associated with claimant's surgery to replace her pacemaker, as it was not medically necessary to cure an injury that arose out of and in the course of her employment with respondent.

Claimant argues that the Board does not have jurisdiction to review the ALJ's preliminary hearing Order. In the alternative, claimant argues that the ALJ was correct in

ordering respondent to pay the costs of claimant's cardiac work-up and the costs of the replacement of claimant's pacemaker.

The issues for the Board's review are:

(1) Does the Board have jurisdiction over the issue in this appeal?

(2) If so, is claimant's need for a new pacemaker to treat her preexisting, underlying personal health condition causally related to her work injury with respondent?

### **FINDINGS OF FACT**

Claimant has a long-standing cardiac problem. She received her first pacemaker in 1972. She had her pacemaker replaced on three occasions prior to the replacement that is the subject of this appeal.

Claimant's employment with respondent ended on January 19, 2007. Her health insurance benefits ended at that time. On March 15, 2007, she was informed by her cardiologist that within six months she would need to replace the batteries on her pacemaker. Because claimant had no health insurance coverage, both she and respondent tried to find a way to fund health insurance for claimant under COBRA. For whatever reason, this was not accomplished, and claimant did not have the batteries in her pacemaker replaced in 2007 or 2008.

In 2009, claimant's authorized physician, Dr. M. Camden Whitaker, scheduled claimant for neck surgery. In preparation for the surgery, claimant underwent a cardiac work-up. The cardiac work-up showed that claimant needed to have her pacemaker replaced before having surgery on her neck. In May 2009, claimant underwent surgery to receive a new pacemaker and submitted the bills to respondent for payment. Respondent had not authorized this cardiac surgical procedure.

### **PRINCIPLES OF LAW AND ANALYSIS**

#### **Does the Board have jurisdiction over the issue in this appeal?**

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2008 Supp. 44-551(i)(2)(A) states in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the

administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,<sup>1</sup> the Kansas Court of Appeals stated:

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

Whether claimant's cardiac work-up and new pacemaker were reasonable medical treatment and whether they were medically necessary before claimant could undergo surgery for her neck injury are not jurisdictional issues on an appeal from a preliminary hearing order. The ALJ determined these issues in claimant's favor, and this Board Member will not disturb those findings at this juncture of the proceedings. However, whether the costs of claimant's cardiac work-up and new pacemaker are compensable as medical treatment expenses for her work-related injury is a jurisdictional issue because it gives rise to a disputed issue of whether treatment for the heart condition is treatment for an injury that arose out of and in the course of claimant's employment with respondent.

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<sup>1</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, rev. denied 221 Kan. 757 (1977).

**Is claimant's need for a new pacemaker to treat her preexisting, underlying personal health condition causally related to her work injury with respondent?**

K.S.A. 2008 Supp. 44-510h requires employers to provide such medical treatment as is "reasonably necessary to cure and relieve the employee from the effects of the injury." The case law interpreting this language has consistently found that the statute contemplates the employer being responsible for all treatment which relieves the employee's symptoms, arising from the injury.<sup>2</sup>

Claimant's need for the neck surgery was directly attributable to her work-related accident and injury. Claimant could not undergo the neck surgery without the cardiac work-up and new pacemaker. Therefore, the cardiac treatment was necessary to cure and relieve the effects of the injury. As such, that treatment was causally related to her work injury with respondent. The ALJ did not exceed his jurisdiction in ordering respondent to pay those costs.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>3</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>4</sup>

**CONCLUSION**

(1) The Board has jurisdiction over the issue of whether the ALJ exceeded his jurisdiction in ordering respondent to pay the medical costs associated with the claimant's cardiac work-up and pacemaker.

(2) The ALJ did not exceed his jurisdiction by ordering respondent to pay those costs.

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<sup>2</sup> See *Carr v. Unit No. 8169*, 237 Kan. 660, 703 P.2d 751 (1985); *Horn v. Elm Branch Coal Co.*, 141 Kan. 518, 41 P.2d 751 (1935).

<sup>3</sup> K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>4</sup> K.S.A. 2008 Supp. 44-555c(k).

GRETCHEN H. HORNER

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1,033,057 and 1,033,058

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Thomas Klein dated September 14, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December, 2009.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c:      Lawrence M. Gurney, Attorney for Claimant  
Dallas L. Rakestraw, Attorney for the Self-Insured Respondent  
Thomas Klein, Administrative Law Judge